

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.J., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Garland, TX, Employer**

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**Docket No. 13-105  
Issued: July 29, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On October 18, 2012 appellant filed an appeal from an August 9, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she was entitled to disability compensation for the period March 12 to April 28, 2011.

On appeal, appellant asserts that the medical evidence established that she was disabled.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a May 3, 2012 decision, the Board found that the case was not in posture for decision regarding appellant's entitlement to disability compensation for the period March 12 to April 28, 2011. The Board remanded the case to OWCP to refer appellant, an updated statement of accepted facts and the medical record to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant was disabled from work for the period March 12 to April 28, 2011 due to the accepted conditions.<sup>2</sup> After this and such further development deemed necessary, OWCP was to issue an appropriate decision.<sup>3</sup> The law and the facts of the previous Board decision are incorporated herein by reference.

Relevant medical evidence discussed in the Board's May 3, 2010 decision includes a January 26, 2011 left knee magnetic resonance imaging (MRI) scan that demonstrated mild patellar tendinosis, very small joint effusion, moderate patellar subluxation, a possible partial or remote injury to the anterior cruciate ligament and mild prolapse of the body of the medial meniscus without visible meniscal tear. In a February 8, 2011 duty status report, Dr. Tom G. Mayer, an attending Board-certified orthopedic surgeon, advised that appellant was totally disabled. On March 17, 2011 he advised that she had a progressive increase in disability over an extended period with a gait disturbance, inability to squat walk with an antalgic gait on the left, patellofemoral joint pain and tenderness with a positive patellar compression test, posterolateral corner pain producing lateral hamstring findings, mild instability of the medial collateral ligament, positive meniscal compression tests suggesting a possible medial meniscus tear and the MRI scan findings of patellar tendinopathy with joint effusion and patellar subluxation and changes consistent with a previous partial anterior cruciate ligament tear and mild prolapse of the medial meniscus. Dr. Mayer explained on May 6, 2011 that appellant was disabled due to her "weak link" knee problem and on May 24, 2011 reported that she had recently been in a motor vehicle accident.

While the claim was before the Board, Dr. Mayer continued to submit reports describing appellant's current condition and restrictions. On August 5, 2011 he reported that she could return to modified duty for four hours daily. Appellant returned to part-time modified duty on August 13, 2011 and received partial wage-loss compensation.

In September 2011 OWCP referred appellant to Dr. Marvin E. Van Hal, a Board-certified orthopedic surgeon, for an opinion regarding appellant's condition and work restrictions. A functional capacity evaluation (FCE) was performed on October 12, 2011 which indicated that she had physical restrictions. In an October 18, 2011 report, Dr. Van Hal noted his review of the

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<sup>2</sup> On August 7, 2008 appellant, a city letter carrier, injured her right elbow and left knee when she tripped and fell while delivering mail. OWCP initially accepted that she sustained a sprain of the right arm and elbow and, in December 2010, also accepted left patellofemoral dysfunction. Appellant was working limited duty at the time she claimed compensation beginning March 12, 2011. A job description indicates that appellant was to case mail for delivery for one to two hours, deliver mail for one to six hours, stand for one to four hours, drive to deliver mail for one to six hours, walk to prepare and deliver mail for one to six hours and lift to prepare and deliver mail for one to eight hours daily.

<sup>3</sup> Docket No. 11-2095 (issued May 3, 2012).

statement of accepted facts and medical record and appellant's complaint of left knee pain. He reviewed the FCE and advised that she had residual symptoms of her right elbow and left knee employment injuries and could work restricted duty for eight hours a day. In an October 19, 2011 report, Dr. Gregory Powell, a Board-certified physiatrist, diagnosed post-traumatic osteoarthritis of the left knee. He advised that appellant could continue to work.

By decision dated October 24, 2011, OWCP denied appellant's claim for compensation for the period April 23 to May 13, 2011 and May 30 to August 26, 2011.

On November 28, 2011 Dr. Larry T. Johnson, Board-certified in surgery and orthopedic surgery, noted appellant's left knee history. He diagnosed continuing knee dysfunction. A December 9, 2011 MRI scan study of the left knee demonstrated severe lateral patellar subluxation, small effusion, peripheral extrusion of the anterior horn and anterior body of the medial meniscus with blunting of the free edge and evidence of lateral tibial and medial chondromalacia. Dr. Mayer continued to submit reports describing appellant's condition. On February 17, 2012 he advised that she could return to full duty.

OWCP determined that a conflict in medical evidence had been created regarding appellant's work capabilities and referred her to Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, for an impartial evaluation. In a February 21, 2012 report, Dr. McCaskill noted appellant's report of the history of illness and his review of the medical record. He advised that, while she had no significant abnormal findings on physical examination other than left patellofemoral crepitus, her complaints were relatively focal and consistent with his diagnoses of chronic lateral epicondylitis of the right elbow and chronic left patellofemoral knee pain. Dr. McCaskill saw no objective reason why appellant could not return to her full, unrestricted duties.

On March 19, 2012 Dr. Johnson examined appellant and discussed the possibility of left knee surgery. In an April 19, 2012 report, Dr. Peter Louis, a Board-certified internist, advised that there was no contraindication for the recommended surgery. OWCP authorized arthroscopic surgery to repair a degenerated left kneecap with reconstruction of the knee. On May 8, 2012 Dr. Johnson performed arthroscopic surgery for left patellofemoral dysfunction. Appellant was placed on the compensation rolls for total disability.

As discussed above, on May 3, 2012, the Board remanded the case to OWCP for referral to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant was disabled from work for the period March 12 to April 28, 2011 due to the accepted conditions. OWCP was to then issue an appropriate decision.<sup>4</sup>

In form reports dated April 23 and May 31, 2012, Dr. Johnson advised that appellant was totally disabled.

In June 2012 OWCP referred appellant, a statement of accepted facts, the medical record and a set of questions to Dr. Zvi Kalisky, Board-certified in physical medicine and

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<sup>4</sup> *Id.*

rehabilitation,<sup>5</sup> who was to provide an opinion as to whether appellant was disabled from work for the period March 12 to April 28, 2011 due to the accepted conditions resulting from the July 28, 2008 employment injury. By report dated July 24, 2012, Dr. Kalisky noted the history of injury, his review of the statement of accepted facts and medical record and appellant's complaints of weakness in the left lower extremity secondary to immobility and constant pain in the left knee and right elbow pain. He provided physical examination findings of the right elbow and left knee. Dr. Kalisky diagnosed status-post right elbow/forearm sprain/strain and patellofemoral dysfunction of the left knee secondary to the employment injury status-post left knee arthroscopy. In answer to specific OWCP questions, he advised that a careful review of the medical records did not support that appellant was disabled from work in the period March 12 to April 28, 2011, stating:

"During that timeframe the patient was under the care of Dr. Mayer. At that time [appellant] was 32 months post injury. She was complaining of chronic pain in the right elbow and left knee. According to the statement of accepted facts [appellant] stopped working on August 6, 2008 and returned on September 4, 2008 and worked until January 20, 2011. Left knee MRI [scan] on January 26, 2011 revealed mild patellar tendinosis and moderate patellar subluxation without osteochondrosis. On an FCE done on February 24, 2011, the patient demonstrated functional capacity within sedentary/light Physical Demand Level. On March 16, 2011 Dr. Powell performed Synvisc injection to the left knee. According to [his] report on April 13, 2011 the injection resulted in 70 percent improvement. Dr. Powell noted that [appellant] demonstrated full range of motion and no ligament instability or effusion. [Appellant] was noted to have severe crepitus. Dr. Powell indicated that there would be no need for further injections for at least six months. Given the above facts, the case for total disability in the period from March 12, 2011 to April 28, 2011 is not established. Based on the above facts there were no objective findings that would have precluded the patient from working modified duty with restrictions."

In a July 26, 2012 report, Dr. Mayer reported that appellant was seen following May 8, 2012 knee surgery. He advised that she had severe limitation of mobility and weight-bearing capability.

In a merit decision dated August 9, 2012, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Kalisky and denied appellant's claim for disability compensation for the period March 12 to April 28, 2011.

### **LEGAL PRECEDENT**

Under FECA, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>6</sup> Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to

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<sup>5</sup> In July 2012 OWCP referred appellant to a medical management nurse.

<sup>6</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA<sup>7</sup> and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>8</sup> Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>9</sup>

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup> Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.<sup>11</sup> Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>13</sup>

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.<sup>14</sup> The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, it shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>15</sup>

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<sup>7</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

<sup>8</sup> *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>9</sup> *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

<sup>10</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>11</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>12</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>13</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>14</sup> 5 U.S.C. § 8123.

<sup>15</sup> 20 C.F.R. § 10.321.

## ANALYSIS

The Board finds that this case is not in posture for decision as a conflict in medical evidence has been created regarding whether appellant met her burden of proof to establish that she was entitled to disability compensation for the period March 12 to April 28, 2011.

In its May 3, 2012 decision, the Board noted that the medical evidence relevant to the period of claimed compensation included a January 26, 2011 left knee MRI scan study that demonstrated mild patellar tendinosis, very small joint effusion, moderate patellar subluxation, a possible partial or remote injury to the anterior cruciate ligament and mild prolapse of the body of the medial meniscus without visible meniscal tear. In a February 8, 2011 duty status report, Dr. Mayer, an attending orthopedic surgeon, advised that appellant was totally disabled. On March 17, 2011 he advised that she had a progressive increase in disability over an extended period of time with a gait disturbance, inability to squat walk with an antalgic gait on the left, patellofemoral joint pain and tenderness with a positive patellar compression test, posterolateral corner pain producing lateral hamstring findings, mild instability of the medial collateral ligament, positive meniscal compression tests suggesting a possible medial meniscus tear and the MRI scan findings of patellar tendinopathy with joint effusion and patellar subluxation and changes consistent with a previous partial anterior cruciate ligament tear and mild prolapse of the medial meniscus. Dr. Mayer explained on May 6, 2011 that appellant was disabled due to her “weak link” knee problem. While he reported on May 24, 2011 that she had recently been in a motor vehicle accident, this was after the period of claimed disability in this case. The Board remanded the case for further development.

In his July 24, 2012 report, Dr. Kalisky, OWCP’s referral physician, advised that he had reviewed the statement of accepted facts and medical record, including Dr. Mayer’s reports. He stated that during the period of claimed disability, appellant complained of chronic pain in the right elbow and left knee. Dr. Kalisky described the January 26, 2011 left knee MRI scan study and February 24, 2011 FCE findings, noting that the latter indicated that she had the functional capacity to perform at the sedentary to light physical demand level. He also noted Dr. Powell’s report on April 13, 2011 that appellant had a 70 percent improvement following a Synvisc injection to the left knee and had full range of motion and no ligament instability or effusion, but that she also had severe crepitus. Dr. Kalisky concluded that, based on the above facts, there were no objective findings that would have precluded the patient from working modified duty with restrictions.”

The Board additionally notes that the statement of accepted facts provided Dr. Kalisky does not include a description of the modified duties that appellant was performing when she stopped work in January 2011.<sup>16</sup> The statement of accepted facts instead merely describes the full duties of a city carrier. Without a full description of the duties that appellant was performing when she stopped work, a mere finding that she could perform sedentary to light work is not sufficient to show that she could perform the modified position.

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<sup>16</sup> *Supra* note 2.

In view of this disagreement between Dr. Kalisky, OWCP's referral physician, and the employee's attending physicians, the Board finds that a conflict in medical evidence has been created. The Board will therefore set aside the August 9, 2012 OWCP decision and remand the case to OWCP for an impartial evaluation regarding whether appellant is entitled to disability compensation for the period March 12 to April 28, 2011. After such further development as deemed necessary, OWCP should issue an appropriate decision.<sup>17</sup>

### **CONCLUSION**

The Board finds this case is not in posture for decision due to a conflict in medical evidence regarding whether appellant is entitled to disability compensation for the period March 12 to April 28, 2011 due to the accepted conditions.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 9, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 29, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> *L.B. (G.B.)*, Docket No. 10-1374 (issued September 19, 2011).